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June 8, 2016

Michael Hyndman
Agent for Service of Process
Aztec Technology Corporation
2550 S. Santa Fe Ave
Vista California 92084

VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael Hyndman
Aztec Containers
2600 South Santa Fe Ave
Vista California 92084

Re: Clean Water Act Notice of Intent to Sue/60-Day Notice Letter
Aztec Container Violations of General Industrial Permit

Dear Mr. Hyndman:

Please accept this letter on behalf of the Coastal Environmental Rights Foundation (CERF) regarding Aztec Technology Corporation's (doing business as Aztec Containers) violations of the State Water Resources Control Board Water Quality Order No. 97-03-DWQ, Natural Pollutant Discharge Elimination System (NPDES), General Permit No. CAS000001, and Waste Discharge Requirements for Discharges of Storm Water Associated With Industrial Activities Excluding Construction Activities (General Industrial Permit).¹ This letter constitutes CERF's notice of intent to sue for violations of the Clean Water Act and General Industrial Permit for the Aztec Containers facility located at 2600 South Santa Fe Ave, Vista, California ("Facility" or "Aztec"), as set forth in more detail below.

Section 505(b) of the Clean Water Act requires that sixty (60) days prior to the initiation of a citizen's civil lawsuit in Federal District Court under Section 505(a) of the Act, a citizen must give notice of the violations and the intent to sue to the violator, the Administrator of the U.S. Environmental Protection Agency, the Regional Administrator of the U.S. Environmental Protection Agency for the region in which the violations have occurred, the U.S. Attorney General, and the Chief Administrative Officer for the State in which the violations have occurred (33 U.S.C. § 1365(b)(1)(A)). This letter provides notice of Aztec's Clean Water Act violations and CERF's intent to sue.

I. Coastal Environmental Rights Foundation (CERF)

CERF is a non-profit public benefit corporation organized under the laws of the State of California with its main office in Encinitas, CA. CERF is dedicated to the preservation,

¹ On April 1, 2014, the State Water Resources Control Board adopted Order No. 2014-0057-DWQ, which amends the Industrial General Permit ("New Industrial Permit"). These amendments became effective on July 1, 2015. All references to the General Industrial Permit are to the Permit as it existed at the time of the violations noted herein.

protection, and defense of the environment, the wildlife, and the natural resources of the California Coast. Members of CERF use and enjoy the waters into which pollutants from Aztec's ongoing illegal activities are discharged, namely Agua Hedionda Creek, Agua Hedionda Lagoon, and eventually the Pacific Ocean. The public and members of CERF use Agua Hedionda Creek and Agua Hedionda Lagoon to fish, boat, kayak, surf, swim, scuba dive, birdwatch, view wildlife, and to engage in scientific studies. The discharge of pollutants by the Aztec Facility affects and impairs each of these uses. Thus, the interests of CERF's members have been, are being, and will continue to be adversely affected by the Aztec Facility Owners and/or Operators' (collectively referred to as "Aztec Owners") failure to comply with the Clean Water Act and the General Industrial Permit.

II. Storm Water Pollution and the General Industrial Permit

A. Duty to Comply and Failure to Enroll

1. *The Aztec Facility*

The Aztec Facility is approximately 100,000 square feet and operates as a goods transfer company consisting of primarily truck and tractor parking. (SWPPP, p. 2). The Facility also has warehouse buildings used for the production and storage of new furniture, equipment and materials. (*Id.*). The Facility SIC code is 3412.

Significant materials potentially onsite include used metal working fluid and fines; solvent cleaners; rinse waters; cuttings, scraps, turnings and fines; paint wastes and paint thinner; metal scraps, chips, borings, and scale; acid, oil and grease; gas and diesel fuel; dirt and metals. (EPA Fact Sheet Sector AA²; SWPPP, pp. 12-13). At the Facility, container modification includes metal cutting, welding, and grinding, wood work, and caulking. (SWPPP, p. 10). After modification, containers are transferred to the eastern portion of the facility to be painted. (*Id.*). Containers are also hand-grinded to remove rust. (*Id.*).

Raw materials, containers, fork lifts, trucks, and additional equipment are stored outdoors, exposing them to storm water. (SWPPP, pp. 10-12). Vehicle maintenance, fabrication, painting and grinding, as well as scrap metal roll-off occur outdoors. (SWPPP, pp. 13-14). As a result, potential pollutants at the Facility include, but are not limited to: pH-affecting substances; TSS, oil and grease, aluminum, iron, zinc, and nitrates/nitrites. (*Id.*).

2. *The Aztec Facility's Discharge of Pollutants*

Under the Clean Water Act, the discharge of any pollutant to a water of the United States is unlawful except in compliance with certain provisions of the Clean Water Act. (See 33 U.S.C. § 1311 (a)). In California, any person who discharges storm water associated with industrial activity must comply with the terms of the General Industrial Permit in order to lawfully discharge. Pursuant to Section C(1) of the General Industrial Permit, a facility operator must comply with all conditions of the General Industrial Permit. (See New Industrial Permit, §I.A.8.

² Available at
https://www.epa.gov/sites/production/files/2015-10/documents/sector_aa_fabmetal.pdf

[dischargers must “comply with all requirements, provisions, limitations, and prohibitions in this General Permit.”]). Failure to comply with the General Industrial Permit is a Clean Water Act violation. (General Industrial Permit, § C.1; New Industrial Permit §XXI.A.). Any non-compliance further exposes an owner or operator to enforcement action and/or removal from General Permit coverage. (*Id.*).

As an enrollee Aztec has a duty to comply with the General Industrial Permit and New Industrial Permit and is subject to all of the provisions therein. Though Aztec has operated at the current site since at least March 4, 2010, Aztec only recently enrolled as a discharger subject to the General Industrial Permit on October 12, 2015, WDID Number 9 371026237.³ All discharges from the Facility prior to October 12, 2015 were therefore unlawful.

Moreover, because the Facility has failed to demonstrate (and cannot demonstrate) compliance with New Industrial Permit Discharge Prohibition VII.B. as a New Discharger, it should not have been enrolled under the New Industrial Permit. The Aztec Owners falsely reported the Facility does not discharge directly to Agua Hedionda Creek in order to obtain coverage. The Facility does discharge directly into the 303(d)-listed water body. Only through such false reporting was the Facility able to obtain coverage without the required documentation.

Because the Facility has contributed to and continues to contribute to or cause a water quality exceedance in Agua Hedionda Creek, all discharges at the Facility are unlawful and must be ceased. (New Industrial Permit, §VII.B. and §§ III.C-D).

B. Failure to Monitor

The Aztec Owners have failed to sample as required under the Industrial Permit and New Industrial Permit. Though there have been numerous qualifying storm events, because Aztec failed to enroll under the Industrial Permit until October 12, 2015 – well after it began discharging storm water – Aztec has failed to monitor as required pursuant to the Industrial Permit. Further, the New Industrial Permit requires dischargers to take two samples between July 1 and December 31 and two samples between January 1 and June 30. (New Industrial Permit, §XI.B.2). Likewise, the Facility SWPPP requires Aztec to sample a minimum of four samples per year. (SWPPP, p. 24). Nonetheless, Aztec has failed to comply with these requirements.

Further, though the SWPPP summarily discounts the potential for the Facility to discharge pollutants for which Agua Hedionda Creek is listed, the Industrial Permit requires more. Agua Hedionda Creek is 303(d) listed for numerous constituents that are likely to be associated with industrial storm water, including: enterococcus, fecal coliform, manganese, phosphorous, selenium, total dissolved solids, and total nitrogen. (New Industrial Permit, Appendix 3). In particular, the EPA Sector AA Fact Sheet specifically identifies manganese as a pollutant associated with metal preparation. Further, the Aztec SWPPP acknowledges the presence of nitrogen at the Facility. (SWPPP, pp. 10-14). The Facility must therefore monitor

³ Indeed, Aztec Technology was identified by the Regional Board as a non-filer on December 21, 2011.

for these additional constituents to verify they are not present in the Facility's discharge. Indeed, prior to enrollment, the Aztec Owners should have conducted such testing. (See New Industrial Permit, §VII.B; see Section A above).

The Aztec Owners had numerous opportunities to sample but failed to do so. (See Exhibit A). When monitoring was conducted, Aztec failed to include analysis for the aforementioned 303(d) constituents. The Aztec Owners are thus subject to penalties in accordance with the New Industrial Permit and General Industrial Permit – punishable by a minimum of \$37,500 per day of violation. (33 U.S.C. §1319(d); 40 CFR 19.4).

C. The Aztec Facility Discharges Contaminated Storm Water in Violation of the General Industrial Permit

Though only recently available, the Aztec monitoring reports indicate consistent exceedances and violations of the General Industrial Permit and New Industrial Permit. Discharge Prohibition A(2) of the General Industrial Permit and New Industrial Permit Sections III.C-D prohibit storm water discharges and authorized non-storm water discharges which cause or threaten to cause pollution, contamination, or nuisance.

Receiving Water Limitation C(1) of the Storm Water Permit prohibits storm water discharges to surface or groundwater that adversely impact human health or the environment. In addition, receiving Water Limitation C(2) prohibits storm water discharges and authorized non-storm water discharges, which cause or contribute to an exceedance of any water quality standards or applicable Basin Plan water quality standards. (See New Industrial Permit Receiving Water Limitations VI.A-C).

The California Toxics Rule ("CTR"), 40 C.F.R. 131.38, is an applicable water quality standard. (*Baykeeper v. Kramer Metals, Inc.* (C.D.Cal. 2009) 619 F.Supp.2d 914, 926). "In sum, the CTR is a water quality standard in the General Permit, Receiving Water Limitation C(2). A permittee violates Receiving Water Limitation C(2) when it 'causes or contributes to an exceedance of' such a standard, including the CTR." (*Id.* at 927).

If a discharger violates Water Quality Standards, the General Industrial Permit and the Clean Water Act require that the discharger implement more stringent controls necessary to meet such Water Quality Standards.(General Industrial Permit, Fact Sheet p. viii; 33 U.S.C. § 1311(b)(1)(C)). The Aztec Owners have failed to comply with this requirement, routinely violating Water Quality Standards without implementing BMPs to achieve BAT/BCT or revising the Facility's SWPPP pursuant to General Industrial Permit section (C)(3) and New Industrial Permit Section X.B.1.

As demonstrated by sample data submitted by Aztec, from October 12, 2015 (and likely beginning in 2011 prior to enrollment) through the present, the Aztec Owners have discharged and continue to discharge storm water containing pollutants at levels in violation of water quality prohibitions and limitations during every significant rain event. The Aztec Facility's sampling data reflects numerous discharge violations (see below). Indeed, Aztec's monitoring data reveals exceedances for zinc as high as **20 times** the applicable standard and iron **110 times** the standard. Notably, Aztec's own sampling data is not subject to impeachment. (*Baykeeper*,

supra, 619 F.Supp. 2d at 927, citing *Sierra Club v. Union Oil Co. of Cal.*, (9th Cir. 1987) 813 F.2d 1480, 1492 ["when a permittee's reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own reports by showing sampling error"]).

This data further demonstrates the Aztec Facility continuously discharges contaminated storm water during rain events which have not been sampled.

No.	Date	Location	Parameter	Units	Result	Benchmark/ WQO
1	12/22/2015	SP-1	Iron	mg/L	16	.3*
2	12/22/2015	SP-1	Zinc	mg/L	1.5	.12
3	12/22/2015	SP-1	Aluminum	mg/L	13	.75
4	12/22/2015	SP-1	TSS	mg/L	470	100
5	12/22/2015	SP-1	Nitrate/Nitrite	mg/L	2.8	.68
6	12/22/2015	SP-2	Iron	mg/L	1.8	.3*
7	12/22/2015	SP-2	Zinc	mg/L	.63	.12
8	1/5/2016	SP-1	Iron	mg/L	33	.3*
9	1/5/2016	SP-1	Zinc	mg/L	2.4	.12
10	1/5/2016	SP-1	Aluminum	mg/L	25	.75
11	1/5/2016	SP-1	TSS	mg/L	1100	100
12	1/5/2016	SP-2	Zinc	mg/L	2.2	.12
13	1/5/2016	SP-2	Aluminum	mg/L	7.6	.75
14	1/5/2016	SP-2	TSS	mg/L	340	100
15	1/5/2016	SP-2	Iron	mg/L	18	.3*
16	3/7/2016	SP-1	Iron	mg/L	4.4	.3*
17	3/7/2016	SP-1	Zinc	mg/L	.29	.12
18	3/7/2016	SP-1	Aluminum	mg/L	3.3	.75
19	3/7/2016	SP-2	Iron	mg/L	2.4	.3*
20	3/7/2016	SP-2	Zinc	mg/L	.4	.12
21	3/7/2016	SP-2	Aluminum	mg/L	2.5	.75
22	5/6/2016	SP-1	Aluminum	mg/L	11	.75
23	5/6/2016	SP-1	Zinc	mg/L	1.2	.12
24	5/6/2016	SP-1	Iron	mg/L	10	.3*
25	5/6/2016	SP-1	TSS	mg/L	700	100
26	5/6/2016	SP-2	Zinc	mg/L	.44	.12
27	5/6/2016	SP-2	Iron	mg/L	.68	.3*
*Basin Plan Water Quality Objective for Agua Hedionda Creek						

In addition, the Aztec SWPPP notes the Facility discharges non-storm water, including condensate from air compressors. (SWPPP, p. 14). Though the New Industrial Permit conditionally allows discharge of such non-storm water, it contains the following caveat: such non-storm water discharges are not in violation of any Regional Water Board Basin Plan or other requirements or municipal agency ordinance or requirements. (New Industrial Permit §§B.1 and 2). Neither the Regional MS4 Permit or the City of San Marcos authorize non-storm

water discharge of *compressor condensate*.

Further, though both the Regional MS4 Permit and the City of San Marcos JURMP allow the discharge of *air conditioning* condensate, such flows must be directed to landscaped areas or other pervious surfaces or the sanitary sewer where feasible. (Order No. R9-2013-0001, amended by Orders No. R9-2015-0001 and No. R9-2015-0100, Section E.2.a.(4)(a)). Thus, even if the air conditioning condensate allowance could be extended to compressor condensate, the Aztec Facility's non-storm water discharges would still be unlawful because the Aztec SWPPP does not mention implementation of any of these requirements. Therefore, Aztec's discharge of unauthorized non-storm water constitutes a violation of Discharge Prohibition III.B.

Every day the Aztec Owners discharged or continue to discharge polluted storm water (and unauthorized non-storm water) in violation of the Discharge Prohibitions and Receiving Water Limitations of the General Industrial Permit is a separate and distinct violation of the Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a). The Aztec Owners are subject to civil penalties for all violations of the Clean Water Act occurring since June 8, 2011. These violations are ongoing and will continue each day contaminated storm water is discharged in violation of the requirements of the General Industrial Permit and New Industrial Permit. CERF will include additional violations when information becomes available.

D. Failure to Develop and/or Implement BMPs that Achieve Compliance with Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology

Effluent Limitation (B)(3) of the General Industrial Permit requires dischargers to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges through implementation of the Best Available Technology Economically Achievable (BAT) for toxic pollutants⁴ and Best Conventional Pollutant Control Technology (BCT) for conventional pollutants.⁵ Likewise, the New Industrial Permit "requires control of pollutant discharges using BAT and BCT to reduce and prevent discharges of pollutants, and any more stringent effluent limitations necessary for receiving waters to meet applicable water quality standards." (New Industrial Permit, §I.D.32; see also, §V.A.).

EPA Benchmarks and New Industrial Permit Numeric Action Levels (NALs) constitute pollutant concentrations which generally indicate whether a facility has successfully developed or implemented BMPs that meet the BAT/BCT. Discharges with pollutant concentration levels above EPA Benchmarks, NALs and/or the CTR demonstrate that a facility has failed to develop and/or implement BMPs that achieve compliance with BAT for toxic pollutants and BCT for conventional pollutants.

The Aztec Facility and monitoring data demonstrates consistent exceedances of not

⁴ Toxic pollutants are found at 40 CFR § 401.15 and include, but are not limited to: lead, nickel, zinc, silver, selenium, copper, and chromium.

⁵ Conventional pollutants are listed at 40 CFR § 401.16 and include biological oxygen demand, total suspended solids, pH, fecal coliform, and oil and grease.

only the CTR, but also EPA benchmarks and NALs. (See monitoring data above). Thus, Aztec's storm water discharge sampling data demonstrates the Facility has not developed and/or implemented BMPs that meet the standards of BAT/BCT. (See *Baykeeper*, *supra*, 619 F.Supp. 2d at 925 ["Repeated and/or significant exceedances of the Benchmark limitations should be relevant" to the determination of meeting BAT/BCT]). Notably, the Facility lacks any advanced BMPs, despite its repeated and egregious water quality standard exceedances. (SWPPP, p. 22).

Thus, the Aztec Owners are seriously in violation of Section V.A. of the New Industrial Permit. Every day the Aztec Owners operate with inadequately developed and/or implemented BMPs in violation of the BAT/BCT requirements is a separate and distinct violation of the Permits and Section 301(a) of the Clean Water Act. (33 U.S.C. § 1311 (a)). Therefore, the Aztec Owners have been in daily and continuous violation of the BAT/BCT requirements of the General Industrial Permit every day since at least June 8, 2011, and are subject to penalties for all such violations. Thus, the Aztec Owners are liable for civil penalties for 1,825 violations of the General Industrial Permit and the Clean Water Act.

These violations are ongoing and the Aztec Owners will continue to be in violation every day they fail to develop and/or implement BMPs that achieve BAT/BCT to prevent or reduce pollutants associated with industrial activity in storm water discharges at the Aztec Facility.

E. Inadequate Storm Water Pollution Prevention Plan

One of the main requirements for the General Industrial Permit is the Storm Water Pollution Prevention Plan (SWPPP). (General Industrial Permit §A; New Industrial Permit §X.). Aztec has not developed an adequate SWPPP as required by the New Industrial Permit. (New Industrial Permit, §X.A.1-10).

The Aztec SWPPP, uploaded to SMARTS on October 12, 2015 fails to adequately evaluate the Facility's potential contribution of pollutants for which the receiving water, Agua Hedionda Creek, is listed. As noted above, Agua Hedionda Creek is listed as impaired for numerous constituents which are likely discharged by Aztec. Indeed, the Facility already contributes to the Creek's impairment for nitrogen, with one sample over four times the nitrogen NAL. Because the Facility discharges directly into Agua Hedionda Creek, such exceedances should trigger immediate SWPPP revision (and more likely immediate cessation of all discharges).

The latest SWPPP also fails to account for the numerous and repeated violations identified by Facility's monitoring data – ensuring these violations continue. The SWPPP is therefore inadequate. (See New Industrial Permit §I.E.37. ["Compliance with water quality standards may, in some cases, require Dischargers to implement controls that are more protective than controls implemented solely to comply with the technology-based requirements in this General Permit."]). If a discharger determines industrial discharges contain pollutants in violation of Receiving Water Limitations (Section VI), the discharger is required to assess the BMPs in the SWPPP and determine whether additional measures and a revised SWPPP are necessary. (New Industrial Permit, §XX.B.1). Aztec has clearly failed to comply with these requirements.

Every day the Aztec Owners operate the Facility without an adequate SWPPP, is a separate and distinct violation of the General Industrial Permit, New Industrial Permit, and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The Aztec Owners have been in daily and continuous violation of the General Industrial Permit and New Industrial Permit⁶ since at least June 8, 2011 (and likely beginning well before then). These violations are ongoing and the Aztec Owners will continue to be in violation every day they fail provide an adequate SWPPP for the Facility. Thus, the Aztec Owners are liable for civil penalties of up to \$37,500 per day of violation for 1,825 violations of the General Industrial Permit and Clean Water Act.

III. Remedies

Upon expiration of the 60-day period, CERF will file a citizen suit under Section 505(a) of the Clean Water Act for the above-referenced violations. During the 60-day notice period, however, CERF is willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of litigation, it is suggested that you initiate those discussions immediately. If good faith negotiations are not being made, at the close of the 60-day notice period, CERF will move forward expeditiously with litigation.

Aztec must demonstrate compliance with New Discharger requirements to discharge into Agua Hedionda Creek, develop and implement an updated SWPPP, install BMPs to address the numerous water quality violations, and implement a robust monitoring plan. Should the Aztec Owners fail to do so, CERF will file an action against Aztec for its prior, current, and anticipated violations of the Clean Water Act. CERF's action will seek all remedies available under the Clean Water Act § 1365(a)(d), including recovery of expert fees, costs, and attorneys' fees. CERF will seek the maximum penalty available under the law which is \$37,500 per day.

CERF may further seek a court order to prevent Aztec from discharging pollutants. A strong or substantial likelihood of success on the merits of CERF's claim exists, and irreparable injuries to the public, public trust resources, and the environments will result if the Facility further discharges pollutants into Agua Hedionda Creek and Agua Hedionda Lagoon.

IV. Conclusion

CERF has retained legal counsel to represent it in this matter. Please direct all communications to Coast Law Group:

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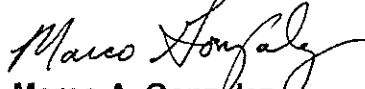
CERF will entertain settlement discussions during the 60-day notice period. Should you

⁶ Violations of the New Industrial Permit commenced July 1, 2015.

wish to pursue settlement, please contact Coast Law Group LLP at your earliest convenience.

Sincerely,

COAST LAW GROUP LLP


Marco A. Gonzalez



Livia Borak

Attorneys for

Coastal Environmental Rights Foundation

cc:

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